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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

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9 JACK SCHWARTZ,

10 Plaintiff,

11 v.

12 JP MORGAN CHASE BANK, N.A.; et al.,

13 Defendants.

3:10-cv-0556-LRH-VPC

ORDER

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15 Before the court is defendants JP Morgan Chase Bank, N.A. (“JP Morgan”) and California
16 Reconveyance Company’s (“CRC”) (collectively “defendants”) motions to dismiss and expunge
17 lis pendens filed on September 29, 2010. Doc. ##6,8.¹ Plaintiff Jack Schwartz (“Schwartz”) filed
18 an opposition (Doc. #12) to which defendants replied (Doc. #14).

19 **I. Facts and Procedural History**

20 In December, 2006, Schwartz refinanced real property through a mortgage note and deed of
21 trust originated and executed by non-party Washington Mutual Bank. Eventually, Schwartz
22 defaulted on the mortgage note and defendants initiated non-judicial foreclosure proceedings.

23 Subsequently, Schwarz filed a complaint against defendants alleging thirteen causes of
24 action: (1) Nevada Unfair Lending Practices Act, NRS 598D.100; (2) civil conspiracy;

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¹ Refers to the court’s docket entry number.

1 (3) injunctive relief; (4) declaratory relief; (5) wrongful foreclosure; (6) fraud through omission;
2 (7) quiet title; (8) contractual breach of good faith and fair dealing; (9) tortious breach of good faith
3 and fair dealing; (10) civil conspiracy; (11) racketeering; (12) unjust enrichment; and (13) fraud in
4 the inducement. Doc. #1, Exhibit 1. Thereafter, moving defendants filed the present motions to
5 dismiss and expunge lis pendens. Doc. ##6, 8.

6 **II. Legal Standard**

7 Defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure
8 to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state
9 a claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading
10 standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That
11 is, a complaint must contain “a short and plain statement of the claim showing that the pleader is
12 entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require
13 detailed factual allegations; however, a pleading that offers “‘labels and conclusions’ or ‘a
14 formulaic recitation of the elements of a cause of action’” will not suffice. *Ashcroft v. Iqbal*, 129 S.
15 Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

16 Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter,
17 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 1949 (quoting
18 *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows
19 the court to draw the reasonable inference, based on the court’s judicial experience and common
20 sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. “The plausibility
21 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a
22 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a
23 defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to
24 relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

25 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as
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1 true. *Id.* However, “bare assertions . . . amount[ing] to nothing more than a formulaic recitation of
 2 the elements of a . . . claim . . . are not entitled to an assumption of truth.” *Moss v. U.S. Secret*
 3 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951) (brackets in original)
 4 (internal quotation marks omitted). The court discounts these allegations because “they do nothing
 5 more than state a legal conclusion—even if that conclusion is cast in the form of a factual
 6 allegation.” *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) “In sum, for a complaint to survive a motion to
 7 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be
 8 plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.*

9 **III. Discussion**

10 Moving defendants filed the present motion to dismiss all claims alleged in Schwartz’s
 11 complaint. *See* Doc. #6. In his opposition, Schwartz concedes that his causes of action for wrongful
 12 foreclosure and unjust enrichment are improper and should be dismissed. Doc. #12. Further,
 13 Schwartz concedes that his causes of action for fraud in the omission, civil racketeering, and fraud
 14 in the inducement are not pled with sufficient particularity in accordance with Rule 9 of the Federal
 15 Rules of Civil Procedure. *Id.* Finally, Schwartz concedes that his tenth cause of action for civil
 16 conspiracy is the same as his second cause of civil conspiracy and should be dismissed as
 17 repetitive. *Id.* Accordingly, the court shall dismiss these uncontested claims and address the
 18 remaining causes of action below.

19 **A. Nevada Unfair Lending Practices Act**

20 NRS 598D.100 prohibits lenders from making loans “without determining, using
 21 commercially reasonable means or mechanisms, that the borrower has the ability to repay the home
 22 loan.” NRS 598D.100(1)(b). Moving defendants were not involved in the origination of Schwartz’s
 23 loan. A defendant who did not make the loan at issue cannot be subject to an unfair lending
 24 practices claim. *See e.g., Velasquez v. HSBC Mortgage Services*, No. 2:09-cv-0784-KJD-LRL,
 25 2009 WL 2338852, *3 (D. Nev. 2009).

1 Additionally, the court notes that Schwartz's complaint references a version of the act after
2 it was amended in 2007. Schwartz's loan originated in 2006. Thus, Schwartz's loan which was
3 issued before the amendment cannot have violated the new Nevada statute requiring a
4 determination that the borrower has the ability to repay the loan.

5 **B. Civil Conspiracy**

6 To establish a claim for civil conspiracy, a plaintiff must allege: (1) the commission of an
7 underlying tort; and (2) an agreement between the defendants to commit that tort. *GES, Inc. v.*
8 *Corbitt*, 21 P.3d 11, 15 (Nev. 2001). Further, the cause of action must be pled with particular
9 specificity as to "the manner in which a defendant joined in the conspiracy and how he participated
10 in it." *Arroyo v. Wheat*, 591 F. Supp. 141, 144 (D. Nev. 1984).

11 Here, Schwartz vaguely alleges that defendants took part in a conspiracy to deprive him of
12 his property. However, there are no allegations in the complaint relating as to how defendants
13 joined the conspiracy, how they participated in the conspiracy, or what actions they took in
14 furtherance of the conspiracy. Thus, Schwartz has failed to allege any actionable misconduct by
15 moving defendants. As such, his conspiracy claim is unsustainable and shall be dismissed.

16 **C. Quiet Title**

17 Under Nevada law, a quiet title action may be brought by someone who claims an adverse
18 interest in property. NRS § 40.010. Here, no defendant claims an interest in the property that is
19 adverse to Schwartz because his interest in the property was encumbered and subject to repayment
20 of the subject loan. Therefore, Schwartz has no grounds to quiet title against moving defendants.

21 **D. Breach of Good Faith and Fair Dealing**

22 **1. Contractual Breach**

23 Under Nevada law, "[e]very contract imposes upon each party a duty of good faith
24 and fair dealing in its performance and execution." *A.C. Shaw Constr. v. Washoe County*, 784
25 P.2d 9, 9 (Nev. 1989) (quoting Restatement (Second) of Contracts § 205). To establish a claim for
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1 breach of the implied covenant of good faith and fair dealing, a plaintiff must show that: (1) the
2 plaintiff and defendant were parties to a contract; (2) the defendant owed a duty of good faith and
3 fair dealing to the plaintiff; (3) the defendant breached his duty by performing in a manner
4 unfaithful to the purpose of the contract; and (4) the plaintiff's justified expectations were denied.
5 *See Perry v. Jordan*, 134 P.3d 698, 702 (Nev. 2006) (citing *Hilton Hotels Corp. v. Butch Lewis*
6 *Prod. Inc.*, 808 P.2d 919, 922-23 (Nev. 1991).

7 Here, Schwartz alleges that defendants breached the implied covenant because they
8 misrepresented the cost of credit involved in the loan agreement. However, moving defendants
9 were not a party to the origination of the loan. Thus, moving defendants could not have
10 misrepresented any portion of the loan agreement.

11 **2. Tortious Breach**

12 Schwartz also alleges that defendants breached their fiduciary duties in their dealings with
13 him. Generally, a loan servicer does not owe a borrower a fiduciary duty. *See Yerington Ford, Inc.*
14 *v. General Motors Acceptance Corp.*, 359 F.Supp.2d 1075, 1092 (D. Nev. 2004). Absent a duty,
15 there can be no breach. *See A.C. Shaw Constr. v. Washoe County*, 784 P.2d 9, 10 (Nev. 1989).

16 Because Schwartz has failed to allege sufficient facts to establish that moving defendants
17 acted outside their capacity as loan servicers, which does not, in itself, create a fiduciary
18 relationship, Schwartz's claim for breach of a fiduciary duty fails to state a claim upon which relief
19 can be granted.

20 **E. Injunctive and Declaratory Relief**

21 Claims for injunctive or declaratory relief are remedies that may be afforded to a party after
22 he has sufficiently established and proven his claims; they are not a separate causes of action. Here,
23 Schwartz's claims fail to establish any claim for relief. Accordingly, Schwartz is not entitled to
24 injunctive or declaratory relief.

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1 **F. Request to Amend**

2 Schwartz concedes in his opposition that his fraud-based causes of action are not plead with
3 sufficient particularity in accordance with Rule 9 and requests leave to amend his complaint as to
4 these causes of action. *See* Doc. #12. However, Schwartz has not provided any argument or factual
5 allegation demonstrating his ability to assert a viable fraud-based claim in an amended pleading
6 and overcome the pleading defects of his initial complaint. Further, Schwartz did not attach a
7 proposed amended complaint for the court's review in accordance with LR 15-1. Accordingly, the
8 court shall deny Schwartz's request to amend his complaint.

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10 IT IS THEREFORE ORDERED that defendants' motion to dismiss (Doc. #6) is
11 GRANTED. Defendants JP Morgan Chase Bank, N.A. and California Reconveyance Company are
12 DISMISSED as defendants.

13 IT IS FURTHER ORDERED that defendants' motion to expunge the lis pendens (Doc. #8)
14 is GRANTED. Defendants JP Morgan Chase Bank, N.A. and California Reconveyance Company
15 shall file an appropriate order with the court expunging the lis pendens and submit the same for
16 signature.

17 IT IS FURTHER ORDERED that plaintiff's motion to extend time (Doc. #9) is GRANTED
18 nunc pro tunc.

19 IT IS SO ORDERED.

20 DATED this 19th day of November, 2010.



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23 LARRY R. HICKS
24 UNITED STATES DISTRICT JUDGE
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